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No. 77 380

In the Supreme Court of the United States

October Term, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

v.

CHARLESTONE STONE PRODUCTS, CO., INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

Warwick C. Lamoreaux
Attorney for Respondent
174 East 8th South St.
Salt Lake City, Utah 84111

October 1977

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OPINION BELOW

The opinion delivered in the court below is appended to the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

The question presented by the Petition is collateral and immaterial to the case below.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Petitioner does not seek a review of the facts in this case, such being set forth in the opinions of the Courts below. Petitioner seeks only a review of a collateral statement by said court, not a reversal of the decision validating the several claims of respondent.

ARGUMENT

The Petition for a Writ of Certiorari does not seek a review of the decision of the Circuit Court of Appeals on the principal issues of this case. Twelve long years ago the Secretary of Interior initiated the action contending that the sand and gravel placer mining claims near Las Vegas, Nevada, held by respondent Charlestone Stone Products Co., Inc., were invalid for want of a timely discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable. The issue became one of fact and the Secretary of Interior based his entire case upon the testimony of one Donald G. Fisher. In the opinion of the United States Court of Appeals for the Ninth Circuit (553 F.2d 1209), set forth on page 7a of Appendix A, petitioner's brief, the following is excerpted:

> "Nine years later the Secretary employed Donald G. Fisher (Fisher)[4] a mining engineer, to investigate and report on the validity of the Charleston claims. Fisher gathered hearsay information from competing

[4] "Fisher had been previously employed by the Secretary in connetion with other contests of sand and gravel claims within the Las Vegas vicinity."

> sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that all of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings."

Both the district court below and the circuit court of appeals characterized the value of the testimony of Donald G. Fisher. The District Court stated:

> "The case for the Government before the Administrative Law Judge was rested on the testimony of Donald G. Fisher, a qualified mining engneer, whose opinion that all the claims were invalid was obviously of little weight because he was not thoroughly familiar with the history of the claims and the mining activity on the clams and had little or no knowledge of the economics of the market respecting sand and gravel in the Las Vegas Valley where the claims were located." (Petitioners brief, App. B, pp. 20a-21a.)

The Circuit Court stated:

> "Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in Verrue, supra, nor is it supported by the other facts in the records • • • In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity." (App. A, p. 11a)

Petitioner does not seek to set aside the determination by the court below of the validity of the claims as established by the facts in the case, and in fact on page 8 of their petition in the footnote they openly concede such:

> "The Ninth Circuit's standard of judicial review of mining claim decisions, as exemplified in this case,

> threatens to hamstring the Secretary of the Interior in the discharge of his responsibility to see that only valid mining claims are recognized and that the rights of the public in the public lands are preserved. See Cameron v. United States, 252 U.S. 450, 459-460. *While we do not regard the error in this case as significant enough to warrant seeking review on this ground, we have noted it because, if the trend of decisions it illustrates continues, we may ask the Court to review the issue in another case.*" (Emphasis added.)

Since the Secretary of Interior uses the foregoing footnote to air his grievance with the "standard of judicial review of mining claim decisions" by the Ninth Circuit Court of Appeals, this respondent respectfully submits that it is indeed fortunate that the courts carefully weigh and consider the facts of a case, thus preserving the rights of citizens of the United States even though such allegedly threatens to "hamstring" the Secretary of the Interior in what he personally considers his rights or duties, including the right to threaten the Ninth Circuit Court that if they do not change the trend of their decisions the Secretary of Interior *might* ask this honorable court to review the issue in another case.

Petitioner now asks this court to review the simple question of "whether water is a locatable mineral under the mining laws of 1872." On page 6 of petitioner's brief, petitioner admits that "the parties had neither briefed nor argued this question." Here petitioner is not attacking the finding of the district court that Charlestone should have access to the water on claim 22, in fact admitting that such right existed under the laws of the state of Nevada; and in fact the only matter sought to be reviewed here is the "Question Presented" which, at most, could be characterized as *obiter dicta*. Such is clearly beyond the points involved and the issues in this case, and standing by itself should not be considered of sufficient merit upon which to grant a writ of certiorari. *Humphrey's Executor v. United States,* 295 U.S. 602, 79 L. Ed. 1611 (1935). Respondent respectfully submits to this court that after the lengthy hearings and litigation in this matter consuming twelve years of time at extraordinary costs and economic loss to the respondent, petitioner should not now be allowed to use this case to air his grievance with the Ninth Circuit Court of Appeals on a statement which is beyond the fundamental issues determined by the courts below. Petitioner fears that the statement of the Court of Appeals that such would "unsettle the law of water rights" should be considered in the light of *United States v. Carver,* 260 U.S. 482, 43 S. Ct. 81, 67 L. ed. 361, 1922, where this court stated:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

We further respectfully submit that this court should not consider the assigned error in this case as significant enough to warrant review, for surely petitioner, at his discretion, may ask this court to review this particular issue in *another case* where such issue is briefed, argued, and squarely met.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WARWICK C. LAMOREAUX
Counsel for Respondent
174 East 8th South St.
Salt Lake City, Utah 84111

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